Planete Enfants Sdn Bhd v Goh San Hwa and other appeals

A

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS B-02(IM)-27–01 OF 2015, B-02–61–01 OF 2015, B-02(NCVC)(W)-62–01 OF 2015 AND B-02(NCVC)(W)-63–01 OF 2015

B

ABDUL AZIZ ABDUL RAHIM, ROHANA YUSUF AND PRASAD ABRAHAM JJCA

30 DECEMBER 2015

C

Civil Procedure — Appeal — Interference by appellate court — Whether appellate court should interfere with findings of fact by trial judge — Whether trial judge erred in failing to award Planete exemplary damages

D

Contract — Agreement — Agreement to purchase and market goods and directors' agreement — Whether agreements valid and binding on parties — Whether there was repudiation of agreement — Whether there was fundamental breach of agreement that went to root of contract

E

Planete Enfants Sdn Bhd ('Planete') was a Malaysian incorporated company marketing several high end baby product brands in Malaysia, whilst Bid Trading Pte Ltd ('BID') was a Singapore incorporated company that at the material times owned sole distribution rights in several baby product brands in Malaysia but did not have the marketing distribution network in Malaysia. Samuel Goh San Hwa ('Goh') was the director and shareholder of BID at that time. On 1 July 2004, Planete and BID executed an agreement ('the agreement') whereby Planete would purchase the baby products from BID and market them through Planete's retail outlets in Malaysia with Goh and Mirjana Pavloksa, appointed as directors and shareholders of Planete effective from 16 April 2003. In the course of managing the business of Planete, Mirjana and her husband, Ivan, discovered that Goh was performing parallel importation activities. At a directors' meeting held on 14 June 2005 the issue of Goh's involvement in parallel importation activities and its adverse effect on the business of Planete was discussed. At the end of the meeting the directors of Planete, namely Ivan, Mirjana and Goh signed an agreement ('the directors' agreement') whereby they agreed, inter alia, to not be involved in any business in direct competition with Planete and to work towards making Planete profitable. In the directors' agreement, Goh in particular agreed not to do any parallel import from Singapore or any other country to Malaysia and not to influence the employees of Planete to divert Planete's business interest. Subsequently Planete filed an action against Goh for breach of his fiduciary duty and for unlawful interference with trade. By way of this suit ('the first

F

G

H

I

suit') Planete sought damages and various declaratory orders. It was Planete's case that Goh through his company BID, was importing similar goods as those which Planete had distribution rights to in Malaysia, under the agreement. In his defence Goh submitted that Planete had repudiated the agreement and that BID had accepted the repudiation and terminated the agreement. Thereafter, Goh filed a suit against Planete ('the second suit') for recovery of the sum of RM356,504.88, which he had advanced to Planete as a loan, as well as for the loss of his 170,000 shares that were allegedly held on trust for him. In support of his claim Goh submitted documentary proof of several sums of money being deposited into Maybank and Public Bank. Planete resisted Goh's claim by alleging that the advances were by a third party. By way of a third suit ('the third suit') BID sued Planete for non-payment of goods sold and delivered to Planete in the sum of SGD939,085.44. Planete refuted BID's claim for alleged unpaid goods sold and delivered and instead counterclaimed for a sum of RM10m for breach of contract and wrongful interference with business in the form of parallel trading conducted by BID. The High Court delivered one decision for all the three suits. The trial judge found the agreement and the directors' agreement to be valid and binding and thus ordered Goh to account to Planete the secret profits made through parallel importation of the baby products by BID or pay damages of RM160,000 to Planete, whichever was the higher. In respect of the second suit, the trial judge ordered Planete to pay Goh the sum of RM356,504.88, which he had advanced to Planete as a loan and also held that the 170,000 shares in Planete were held on trust for Goh. As for the third suit, the trial judge ordered Planete to pay Goh SGD939,085.44 with interest and ordered BID trading to account to Planete the secret profits made through parallel importation of the baby products by BID or pay damages of RM160,000 to Planete, whichever was the higher. These four appeals arose against that decision. Planete was appealing against the order to repay Goh the sum of RM356,504.88, which he had advanced to Planete as a loan and also against the declaratory order that the 170,000 shares in Planete were held on trust for Goh ('the first appeal'). Goh was appealing against the trial judge's finding that the agreement and the directors' agreement were valid and binding and the order to account to Planete the secret profits made by him through parallel importation by BID or damages ('the second appeal'). BID was in turn also appealing against the order to account to Planete the secret profits made by it through parallel importation by BID or damages ('the third appeal'). The fourth and final appeal was by Planete against the order requiring it to pay Goh SGD939,085.44 with interest.

Held, allowing Planete's appeal against the order to repay Goh the sum of RM356,504.88 and dismissing the other appeals with each party to bear its own cost:

(1) The grounds relied on by BID to say that Planete had repudiated the 2004 agreement were insufficient to prove a case of repudiation of the

agreement. The refusal to pay the money owing for the alleged goods sold and delivered was not proven, but even if it was true, it would only constitute a breach of the term of the agreement as to payment. The other grounds were more internal problems within the company and under the circumstances these did not constitute a fundamental breach of the agreement that went to the root of the contract making the contract impossible of performance or tantamount to Planete no longer intending to be bound by the terms of the agreement so as to constitute repudiation of the contract. The directors' agreement was a commitment and understanding among the directors of Planete to protect the business of Planete against competition from their own (see paras 23–24).

(2) The simplified view of parallel importation is importation of goods into a territorial market in competition with the existing distributor of the goods in that market. Although parallel trading was not forbidden under Malaysian law, it had been made forbidden by the agreement. However, there was no evidence presented by Planete to prove parallel importation by Goh or BID. The directors' agreement could not be construed as an admission by Goh that he was involved in parallel importation activities. At the same time based on the evidence and facts and circumstances of this case it was more likely that Goh was in breach of his fiduciary duty as director of Planete and therefore in breach of the agreement (see paras 25 & 28–30).

(3) As for the loan sum of RM349,297.22, advanced to Planete by Goh, the evidence showed that the deposits into the bank accounts occurred around 2003 or the time when Goh was director and shareholder of Planete. On the totality of the evidence and on the balance of probabilities it was not satisfactorily proven by Goh that this was a personal loan to Planete (see paras 33–34).

(4) As for the claim for the non-payment of goods in the sum of SGD939,085.44 there was no good reason to interfere with the findings of the trial judge. As such, Planete's appeal on this issue ought to be dismissed (see paras 36 & 42).

(5) The trial judge's finding of fact on the evidence that the dealing with or transfer of the shares was without the knowledge of Goh was correct (see para 45).

(6) Planete's submission that the trial judge had erred in failing to award it exemplary damages against Goh was without merit. The trial judge was correct on the law that the award of exemplary damages was discretionary and in finding that Goh's conduct was not 'absolute disregard of the rights of Planete' (see para 46).

[Bahasa Malaysia summary

Planete Enfants Sdn Bhd ('Planete'), sebuah syarikat yang diperbadankan di Malaysia, memasarkan beberapa produk bayi berjenama mewah di Malaysia, manakala Bid Trading Pte Ltd ('BID') adalah syarikat yang diperbadankan di Singapura, yang pada masa material, memiliki hak pengedaran tunggal dalam beberapa produk bayi berjenama di Malaysia tetapi tidak mempunyai rangkaian pengedaran pemasaran di Malaysia. Samuel Goh San Hwa ('Goh') adalah pengarah dan pemegang saham BID pada masa itu. Pada 1 Julai 2004, Planete dan BID memasuki perjanjian ('perjanjian') di mana Planete akan membeli produk bayi daripada BID dan memasarkannya di kedai-kedai Planete di Malaysia dengan Goh dan Mirjana Pavloksa, dilantik sebagai pengarah dan pemegang saham Planete efektif dari 16 April 2003. Dalam penjalanan urusan perniagaan Planete, Mirjana dan suaminya, Ivan, mendapati Goh melaksanakan aktiviti pengimportan selari. Semasa mesyuarat pengarah yang diadakan pada 14 Jun 2005, isu penglibatan Goh dalam aktiviti pengimportan selari dan kesan buruknya terhadap urusan Planete telah dibincangkan. Di akhir mesyuarat itu pengarah Planete iaitu Ivan, Mirjana dan Goh menandatangani perjanjian ('perjanjian pengarah-pengarah'), menyetujui, antara lain, untuk tidak terlibat dalam mana-mana perniagaan yang bersaing secara langsung dengan Planete dan bekerja untuk keuntungan Planete. Dalam perjanjian pengarah-pengarah, Goh khususnya bersetuju untuk tidak melakukan apa-apa import selari dari Singapura atau mana-mana negara lain ke Malaysia dan untuk tidak mempengaruhi kakitangan Planete untuk mengalihkan kepentingan perniagaan Planete. Selepas itu, Planete memfailkan tindakan terhadap Goh bagi pelanggaran kewajipan fidusiari dan gangguan salah perdagangan. Melalui guaman ini ('guaman pertama'), Planete memohon ganti rugi dan pelbagai perintah pengisytiharan. Planete menghujahkan Goh, melalui BID syarikatnya, mengimport barangan yang sama seperti Planete yang mempunyai hak pengedaran di Malaysia di bawah perjanjian itu. Dalam pembelaannya, Goh menghujahkan Planete menolak perjanjian tersebut dan bahawa BID telah menerima penolakan dan menamatkan perjanjian. Berikutan itu, Goh memfailkan guaman terhadap Planete ('guaman kedua') bagi mendapatkan jumlah RM356,504.88, yang diberi kepada Planete sebagai pinjaman, dan juga untuk kehilangan saham 170,000 yang didakwa dipegang sebagai amanah untuknya. Dalam menyokong tuntutannya, Goh mengemukakan bukti dokumentari iaitu beberapa jumlah wang yang didepositkan ke dalam Maybank dan Public Bank. Planete menolak tuntutan Goh dengan mendakwa bahawa wang pendahuluan tersebut adalah daripada pihak ketiga. Melalui guaman ketiga ('guaman ketiga') BID menyaman Planete kerana tidak membayar barangan yang dijual dan diserahkan kepada Planete berjumlah SGD939,085.44. Planete menafikan dakwaan BID tentang barangan yang tidak berbayar yang didakwa dijual dan dihantar dan sebaliknya membuat tuntutan balas bagi sejumlah RM10 juta kerana melanggar kontrak dan gangguan salah perniagaan dalam

bentuk perdagangan selari yang dijalankan oleh BID. Mahkamah Tinggi menyampaikan satu keputusan bagi ketiga-tiga guaman. Hakim bicara mendapati perjanjian dan perjanjian pengarah-pengarah sah dan mengikat dan dengan itu mengarahkan Goh bertanggungan kepada Planete bagi keuntungan rahsia dibuat melalui pengimportan selari produk bayi oleh BID atau membayar ganti rugi RM160,000 kepada Planete, yang lebih tinggi. Berhubung guaman kedua, hakim bicara mengarahkan Planete membayar Goh jumlah RM356,504.88, yang didahulukan kepada Planete sebagai pinjaman dan juga memutuskan bahawa 170,000 saham dalam Planete dipegang sebagai amanah bagi Goh. Bagi guaman ketiga, hakim bicara mengarahkan Planete membayar Goh SGD939,085.44 dengan faedah dan mengarahkan dagangan BID untuk bertanggungan untuk Planete bagi keuntungan rahsia yang dibuat melalui pengimportan selari produk bayi oleh BID atau membayar ganti rugi RM160,000 kepada Planete, mengikut mana yang lebih tinggi. Keempat-empat rayuan timbul berikutan keputusan itu. Planete merayu terhadap perintah itu untuk membayar balik Goh jumlah RM356,504.88, yang didahulukan kepada Planete sebagai pinjaman dan juga terhadap perintah pengisytiharan bahawa 170,000 saham dalam Planete dipegang sebagai amanah buat Goh ('rayuan pertama'). Goh merayu terhadap keputusan hakim bicara bahawa perjanjian dan pengarah perjanjian adalah sah dan mengikat dan perintah itu untuk menjelaskan kepada Planete keuntungan rahsia yang dibuat olehnya melalui pengimportan selari dengan BID atau ganti rugi ('rayuan kedua'). BID sebaliknya merayu terhadap perintah itu untuk menjelaskan kepada Planete keuntungan rahsia yang dibuat olehnya melalui pengimportan selari dengan BID atau ganti rugi ('rayuan ketiga'). Rayuan keempat dan terakhir adalah oleh Planete yang merayu terhadap perintah yang menghendakinya membayar Goh SGD939,085.44 dengan penuh faedah.

Diputuskan, membenarkan rayuan Planete terhadap perintah untuk membayar balik Goh jumlah RM356,504.88 dan menolak rayuan lain dengan setiap pihak menanggung kos sendiri:

(1) Alasan yang disandarkan oleh BID untuk mengatakan bahawa Planete telah menolak perjanjian 2004 tidak mencukupi untuk membuktikan kes penolakan perjanjian. Keengganan untuk membayar wang yang terhutang bagi barangan yang didakwa dijual dan dihantar tidak terbukti, tetapi walaupun ia adalah benar, ini hanya pelanggaran terma perjanjian iaitu bayaran. Alasan lain adalah lebih berupa masalah dalaman syarikat dan dalam hal keadaan ini bukan satu pelanggaran asas perjanjian yang pergi ke akar umbi kontrak hingga menjadikan kontrak mustahil untuk dilaksanakan atau terjumlah kepada Planete tidak lagi berniat untuk terikat dengan terma perjanjian bagi membentuk penolakan kontrak. Perjanjian pengarah-pengarah adalah komitmen dan

persefahaman sesama para pengarah Planete untuk melindungi perniagaan Planete daripada persaingan dengan mereka sendiri (lihat perenggan 23–24).

(2) Pandangan pengimportan selari yang dipermudahkan adalah pengimportan barang ke pasaran dalam bersaing dengan pengedar sedia ada barangan di pasaran itu. Walaupun perdagangan selari tidak dilarang di bawah undang-undang Malaysia, ini dilarang oleh perjanjian itu. Walau bagaimanapun, tidak ada bukti yang dikemukakan oleh Planete untuk membuktikan pengimportan selari dengan Goh atau BID. Perjanjian pengarah-pengarah tidak boleh ditafsirkan sebagai pengakuan oleh Goh bahawa dia terlibat dalam aktiviti pengimportan selari. Pada masa yang sama berdasarkan bukti dan fakta-fakta dan hal keadaan kes ini, adalah lebih cenderung bahawa Goh melanggar kewajipan fidusiari sebagai pengarah Planete dan oleh itu melanggar perjanjian tersebut (lihat perenggan 25 & 28–30).

(3) Bagi jumlah pinjaman sebanyak RM349,297.22, yang didahulukan kepada Planete oleh Goh, bukti-bukti menunjukkan bahawa deposit ke dalam akaun bank berlaku sekitar 2003 atau semasa Goh merupakan seorang pengarah dan pemegang saham Planete. Berdasarkan keseluruhan keterangan dan atas imbangan kebarangkalian, Goh tidak membuktikan hingga tahap memuaskan hati bahawa ini pinjaman peribadi untuk Planete (lihat perenggan 33–34).

(4) Bagi tuntutan kegagalan membayar barangan berjumlah SGD939,085.44, tidak ada alasan yang baik untuk mengganggu dapatan hakim bicara. Oleh itu, rayuan Planete bagi isu ini wajar ditolak (lihat perenggan 36 & 42).

(5) Dapatan hakim bicara fakta tentang keterangan bahawa urusan dengan atau pemindahan saham adalah tanpa pengetahuan Goh adalah betul (lihat perenggan 45).

(6) Hujahan Planete bahawa hakim bicara terkhilaf apabila gagal mengawardkan ganti rugi teladan terhadap Goh adalah tidak bermerit. Hakim bicara bertindak betul di bawah undang-undang bahawa award ganti rugi teladan adalah budi bicara dan dalam memutuskan tindakan Goh tidak mempedulikan hak Planete secara mutlak (lihat perenggan 46).]

Notes

For cases on agreement in general, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 3255–3345.

For cases on interference by appellate court, see 2(1) *Mallal's Digest* (5th Ed, 2015) paras 1353–1395.

Cases referred to

Dato' Raja Ideris bin Raja Ahmad & Ors v Teng Chang Khim (Chairman of the select Committee on Competence, Accountability and Transparency and the Chairman of the Committee of Rights and Privileges State Legislative Assembly of Selangor) & Ors [2012] 5 MLJ 490, CA (refd)

Honda Motor Co Ltd and another v Neesam and others [2008] EWHC 338, Ch D (refd)

KFH Ijarah House (M) Sdn Bhd v Aamir Nordin bin Ariffin [2010] MLJU 450; [2010] 1 LNS 394, HC (refd)

Rasiah Munusamy v Lim Tan & Sons Bhd [1985] 2 MLJ 291, SC (refd)

Tien Ying Hong Enterprise Sdn Bhd v Beenion Sdn Bhd [2010] 8 MLJ 550, HC (refd)

Winthrop Products Inc & Anor v Sun Ocean (M) Sdn Bhd & Anor [1988] 2 MLJ 317 (refd)

Legislation referred to

Companies Act 1965 s 132(1)
Evidence Act 1950 s 73A
Rules of Court 2012 O 15 r 16
Specific Relief Act 1950 ss 41, 42

Appeal from: Suit Nos MT2–22–227 of 2007, 22NCVC-39–01 of 2014 and 22NCVC-1134–09 of 2012 (High Court, Shah Alam)

Mohd Arief Emran bin Arifin (Nimisha Jaya Gobi and Deborah Yee with him) (Wong & Partners) in Civil Appeal No B-02(IM)-27–01 of 2015 for the appellant.

Dhyana Shila Vasanthan (Karen Isabel Wilfred and Kamala Saraswathy with her) (Dhyan & Co) in Civil Appeal No B-02–61–01 of 2015 for the appellant.

Karen Isabel Wilfred (Dhyana Shila Vasanthan and Kamala Saraswathy with her) (Wilfred) in Civil Appeal No B-02(NCVC)(W)-62–01 of 2015 for the appellant.

Mohd Arief Emran bin Arifin (Nimisha Jaya Gobi and Deborah Yee with him) (Wong & Partners) in Civil Appeal No B-02(NCVC)(W)-63–01 of 2015 for the appellant.

Dhyana Shila Vasanthan (Karen Isabel Wilfred and Kamala Saraswathy with her) (Dhyan & Co) in Civil Appeal No B-02(IM)-27–01 of 2015 for the respondent.

Mohd Arief Emran bin Arifin (Nimisha Jaya Gobi and Deborah Yee with him) (Wong & Partners) in Civil Appeal No B-02–61–01 of 2015 for the respondent.

Mohd Arief Emran bin Arifin (Nimisha Jaya Gobi and Deborah Yee with him) (Wong & Partners) in Civil Appeal No B-02(NCVC)(W)-62–01 of 2015 for

the respondent.

Karen Isabel Wilfred (Dhyana Shila Vasanthan and Kamala Saraswathy with her) (Wilfred) in Civil Appeal No B-02(NCVC)(W)-63–01 of 2015 for the respondent.

Abdul Aziz Abdul Rahim JCA (delivering judgment of the court):

[1] The learned High Court judge heard three suits concurrently. The three suits are: Suit No 22–227 of 2007 ('Suit No 1'); Suit No 22NCVC-39–01 of 2014 ('Suit No 2') and Suit 22NCVC-1134–09 of 2012 ('Suit No 3').

[2] In Suit No 1, Planete Enfants Sdn Bhd (the plaintiff) sued Samuel Goh Sun Hwa (the defendant) primarily for breach of fiduciary duty alleging parallel trading committed by Samuel Goh Sun Hwa, the major shareholder in BID Trading Pte Ltd and who also was a director of Planete Enfants Sdn Bhd and for unlawful interference with trade seeking damages and various declaratory orders.

[3] In Suit No 2, Samuel Goh Sun Hwa (the plaintiff) sued Planete Enfants Sdn Bhd (the defendant) for recovery of RM356,504.88 purportedly as a personal loan by Goh to the company Planete Enfants as well as for the loss of his shares that were allegedly held on trust for him. In Suit No 3, BID Trading Pte Ltd (the plaintiff) sued Planete Enfants Sdn Bhd (the defendant) for allegedly unpaid goods sold and delivered in the sum of SGD939,085.44 and Planete Enfants Sdn Bhd's counterclaim for a sum of RM10m for breach of contract and wrongful interference with business in the form of parallel trading allegedly conducted by BID Trading Pte Ltd.

[4] In an earlier proceedings in Suit No 22–1173 of 2007 at Shah Alam High Court, Planete had obtained an injunction and Anton Pillar order against several companies (Brand Melody Sdn Bhd, Bosme Bounty Sdn Bhd and Ors) to restrain these companies from preventing Planete from selling BID Trading's products in Malaysia by reason that Planete was still the exclusive distributor for BID Trading pursuant to the agreement entered between Planete and BID. Acting on the Anton Pillar order Planete therefore seized real physical evidence of baby products that were purchased by the said companies from BID Trading.

[5] The learned High Court judge delivered only one decision for all the three suits. In his decision the learned judge made the following orders (extracted from His Lordship's ground of judgment):

> 147. As for the three suits before me, my judgment and orders are as follows based on the aforegoing reasons:

Suit 1 and Suit 2

(i) I declare that the agreement between Planete Enfants Sdn Bhd and B I D Trading Pte Ltd dated 1 July 2004 and 14 June 2005 were valid and binding up to 31 December 2009;

(ii) I order Goh San Hwa to account to Planete Enfants Sdn Bhd the secret profits made through parallel importation of the baby products by B.I.D. Trading Pte Ltd, Sheng Xin Trading Pte Ltd or other companies controlled by him into Malaysia between 1 July 2004 and 31 December 2009 or pay damages to Planete Enfants Sdn Bhd of RM160,000 whichever is the higher;

(iii) I also order simple interest thereon at 5%pa from 13 February 2007 until full realisation;

(iv) I enter judgment and order Planete Enfants Sdn Bhd to pay Goh San Hwa the sum of RM349,297.22;

(v) I also order simple interest thereon at 5%pa from 15 July 2009 until full realisation;

(vi) I declare that the 170,000 shares held by Noor Zulaini bt Yunos in Planete Enfants Sdn Bhd were held on trust for Goh San Hwa;

(vii) the application of Goh San Hwa to set aside the interlocutory injunction dated 12 April 2007 is struck off; and

(viii) the parties shall bear their own respective costs.

Suit 3

(i) I enter judgment and order Planete Enfants Sdn Bhd to pay Goh San Hwa the sum of SGD939,085.44;

(ii) I also order interest there on at 5%pa from 28 February 2007 till full realisation;

(iii) I order BID Trading Pte Ltd to account to Planete Enfants Sdn Bhd the secret profits made through parallel importation of the baby products by BID Trading Pte Ltd into Malaysia between 1 July 2004 and 31 December 2009, or pay damages to Planete Enfants Sdn Bhd of RM160,000 whichever is the higher; and

(iv) the parties shall bear their respective costs.

[6] There are four appeals filed against that decision and they are:

(a) B-02(IM)-27–01 of 2015 where Planete Enfants Sdn Bhd, the appellant is appealing against the order to repay the respondent ('Goh') a sum of RM349,297.22 purported to be a personal loan advance to the appellant by Goh, the director and major shareholder of BID Trading, and also

director and shareholder of Planete. The appellant is also appealing against the declaratory order that the shares held by Noor Zulaini bt Yunus were held on trust for Goh, and also against the refusal of the High Court to award exemplary damages to the appellant for Goh's acts in parallel importation and unlawful interference of trade of the appellant;

(b) B-02–61–01 of 2015 — Goh San Hwa (the appellant) — in which Goh is appealing against between the appellant/plaintiff and the respondent/defendant dated 1 July 2004 and 14 July 2005 respectively were declared valid and binding up to 31 December 2009, and the appellant/plaintiff was ordered to account to the respondent/defendant the secret profits made by the appellant/plaintiff through parallel importation by BID Trading Pte Ltd between 1 July 2004 and 31 December 2009 or pay damages. This appeal is also against the order striking off the appellant's/plaintiff's application before the High Court to set aside the interlocutory injunction obtained by the respondent/defendant against the appellant/plaintiff as well as against the dismissal of the appellant's/plaintiff's declaration in paras 34(e), (f), (g), (k), (l), (m), (n), (o) and (q) of the appellant/plaintiff's counterclaim;

(c) B-02(NCVC)(W)-62–01 of 2015 — BID *Trading Pte Ltd v Planete Enfants Sdn Bhd* — in which BID (the appellant/plaintiff) is appealing against the order to account to the respondent/defendant for secret profit through parallel importation of baby products by the appellant/plaintiff into Malaysia between 1 July 2004–31 December 2009 or in alternative to pay damages to respondent/defendant in the sum of RM160,000, whichever is higher; and

(d) B-02(IM)(NCVC)-63–01 of 2015 — *Planete Enfants Sdn Bhd v BID Trading Pte Ltd* — in which Planete (the appellant/defendant) is appealing against the whole decision of the High Court ordering Planete to pay Goh the sum of SGD939,085.44 with interest thereon at 5%pa from 28 February 2007 till full realisation.

[7] In these appeals the parties shall be referred to by their respective names and their position as the plaintiff or the defendant before the High Court shall be construed accordingly.

[8] The material facts of the case have been adequately narrated by the learned High Court judge in his lengthy judgment. However for easy understanding of the issues, we shall state the salient features of the facts and will refer to it in more detail whenever it is necessary to do so for the purpose of this judgment.

[9] Planete Enfants Sdn Bhd ('Planete') is a company incorporated in Malaysia in 2003 by one Ivan Frederick Claude Malignon ('Ivan') and one Noor Zulaini bt Yunos. They were the first directors of the company. Another individual one Mirjana Pavlovska ('Mirjana') was also involved with the Planete. Mirjana is the wife of Ivan and is also his business associate. The management of Planete was mainly undertaken by Ivan and Mirjana.

[10] Prior to the incorporation of Planete, Ivan and Mirjana had commenced business marketing consumer products in Malaysia in early 2000s through their company called Glorious Fields Ltd. They were also at the material time the agent of Peg Perego brand of children products.

[11] BID Trading Pte Ltd ('BID') was a Singapore incorporated company. BID was control by Samuel Goh Sun Hwa ('Goh'), a Singaporean. Goh then was also a director and shareholder of BID. BID at the material times owned sole distribution rights in several baby product brands in Malaysia including Maclaren brand. But BID did not have the marketing distribution network in Malaysia.

[12] Between late 2000 and early 2003, there were meetings and discussions between Ivan and Goh to discuss the formation of a synergistic alliance between BID and Planete that will enable Planete to introduce, launch and promote new high end baby products brand in Malaysia. It was an arrangement for a win-win situation. The arrangement was that Planete would purchase the baby products from BID and sell them or market them through Planete retail outlets in Malaysia particularly at Atria Damansara Jaya and the Mall Kuala Lumpur. This arrangement was formalised by an agreement dated 1 July 2004 ('the agreement') executed by Planete and BID. Prior to that Goh and Mirjana were appointed as directors and shareholders of Planete effective from 16 April 2003. Thus, the incorporation of Planete is to enable BID, Goh and Ivan to pool their resources and capture a bigger share of the Malaysian market for high end baby products.

[13] Ivan and Mirjana did not have any distribution rights of high end baby products. Ivan's own testimony said that their company Glorious Fields Ltd was only agent for baby product brand Peg Perego for Asia and through it Ivan and his wife Mirjana were consultants for the product for their overseas principal. In Ivan's own words they are the exporter of the products and in charge of controlling the market in Asia. Their job was to find distributors and to monitor them. The evidence also shows that at the time when the agreement was signed BID had the exclusive rights to distribute three brands of baby products in Malaysia namely Peg Prego, Dorel and Maclaren. Except for Maclaren baby products, BID did not have any formal exclusive distributorship for Peg Prego and Dorel. In fact for Dorel baby products Ivan

conceded in his evidence that BID has the exclusive distribution rights in Malaysia since 2001.

[14] It was Goh and BID contention that through the agreement Planete became the exclusive distributor of BID goods including high end baby products of which BID had the exclusive distribution rights from the respective principals.

[15] In the course of managing the business of Planete, Ivan and Mirjana discovered that Goh was committing acts of bribery against the employees of Planete and performing parallel importation activities. At about the same time also Planete decided to apply banking facilities to finance the purchase of baby products from BID pursuant to the agreement. For that purpose, as well as to discuss Goh's alleged parallel importation activities, Planete held a directors' meeting on or around 14 July 2005. At the meeting, the issue of Goh alleged involvement in parallel importation activities and its adverse effect on the business of Planete as exclusive distributor of high end baby products was discussed. This is evident by the minutes of the meeting which were referred to by learned counsel for Planete in his written submissions and which are reproduce below:

> Problems to be solved urgently
>
> 1. It is imperative that Samuel (GSH) through BID stops parallel import to Malaysia; This is undermining the integrity, image and business in general of Planete Enfants. As director of Planete Enfants Samuel (GSH) should ensure that interests of Planete Enfants. Parallel imports have given rise to insecure retailers that lose confidence in Samuel (GSH) as well as our internal demotivation. As we have discussed many times before that should be a clean and united management of Planete Enfants. Our agreement as partners has been to insure that Planete Enfants is the exclusive distributor in Malaysia.
> 2. Planete Enfants is now well known in Malaysia and even Dato' Sharizah will be coming to officiate the launching of the concept of PE as a Megastore Chain. Not only it is key to keep a clear vision towards the company and staff as an entity, it is important to do clean business and not be associated as a black marketer and unfair player.
> 3. The brands such as Peg Perego, Maxi Cosi, Mclaren, Tiny Love, Safety Fits, etc. have been successfully launched on the market by Planete Enfants and are supported by regular advertising, etc. Small players such as Bambino etc are only fishing for short term opportunities and if it weren't for Planete Enfants the sale of all these items and even open items would not have been possible to such an extent. Let's preserve and appreciate the efforts that have been done by daily management by Mirjana and Ivan and the devotion of our regular staff!

4. The T/O, Cashflow and faster development has been hindered by these parallel imports.

[16] The meeting ended up with Planete directors namely Ivan, Mirjana and Goh executing an agreement dated 14 May 2005 ('2005 directors' agreement'). Under the agreement, the directors agreed and pledged to build on the business development of Planete and to work towards making it profitable. They also agreed not to be involved in any business that is in direct competition with Planete. In respect of Goh in particular, he agreed as director of Planete, not to do any parallel import from Singapore (or any other country) to Malaysia and not to give money, commissions or divert the interests of employees from Planete or Glorious Field Ltd (ie the company previously set up by Ivan and Mirjana) in Malaysia.

[17] In another development in relation to the expansion of Planete's business in Malaysia, (and this apparently occurred after the execution of the 2005 director's agreement), Planete had secured exclusive distribution rights of baby products with various suppliers or principals other than BID between 2005 and 2007. For the purpose of this appeal, the material suppliers are Maclaren (HK) Ltd, Peg Perego and Dorel. Planete claimed it obtained exclusive distribution rights for Maclaren products by a letter dated 18 July 2005. As for Peg Perego products, the exclusive distributorship agreement was dated 2 August 2005 and the confirmation letter was dated 13 October 2009. In the case of Dorel's products the confirmation letter was dated 19 October 2006 and the exclusive distributorship agreement was dated 13 March 2014.

[18] The issues in these appeals are as follows. Firstly, whether Goh had committed a breach of fiduciary duty as director of Planete and had engaged in parallel importation to the detriment of Planete. Secondly, whether Goh had advanced monies for Planete's use in the course of their business. Thirdly, whether Planete owed BID money for goods sold and delivered on purchase orders issued by Planete. Fourthly, whether the shares in Planete held by Noor Zulaini bt Yunos were held on trust for Goh.

OUR DECISION

[19] As to the first issue the learned judge found that BID and its alter ego, Goh, had engaged in parallel trading or importation activities. The learned judge found that the agreement between Planete and BID dated 1 July 2004 and the agreement amongst the directors of Planete agreed on 14 July 2005 were valid and binding up to 31 December 2009 and BID never terminated the 2004 agreement at any time prior to that date. Applying objective test and construction to the relevant clauses of the 1 July 2004 agreement the learned

judge held that clause 1(d) of the agreement emphasises on three principle obligations from the parties. Firstly, Planete was obliged to procure its supply of baby products for marketing in Malaysia from BID for products which BID owned exclusive distribution rights in Malaysia. Secondly, Planete's rights to procure baby products direct from manufacturers or original equipment manufacturer (OEM) is limited to products without any exclusive distributorship rights in Malaysia given by the OEM to any entity as yet. Thirdly, BID was obliged to, supplying baby products to only the Planete in Malaysia and prohibited from supplying the products to any other entity in Malaysia notwithstanding that BID owned exclusive distribution rights to those products in Malaysia. The learned judge further found that these obligations subsisted at least until 31 September 2009.

[20] The baby products that are relevant here were Maclaren, Peg Perego, Dorel and BFree. On the evidence the learned judge found that BID only has exclusive rights (to this day) for Maclaren products. There was no exclusive rights for Peg Perego, Dorel and BFree. For these three latter products, the exclusive rights were given to the Planete by the manufacturers only around 2005–2006.

[21] The above findings by the learned judge is important to the determination of the first issue. However before we discuss the issue on the parallel importation it would be necessary to determine whether the learned judge was correct in his finding that the two agreements dated 1 July 2004 and 14 July 2005 respectively were valid and binding on the parties until 31 December 2009?

[22] Learned counsel for BID and Goh contended that Planete had repudiated the 2004 agreement and BID had accepted the repudiation and had terminated the 2004 agreement in 2006. In any event it was submitted that Planete was unequivocally notified of BID's acceptance of the repudiation by the former sometimes in February 2007 and the termination of the 2004 agreement at the very latest was when BID filed its claim against Planete. The grounds argued by learned counsel for BID to say that Planete had repudiated the 2004 agreement are as follows: (a) Planete refused to provide BID with Planete monthly sales reports as required under the agreement; (b) Planete refused to pay the price of the goods sold and delivered to it by BID on the due date; (c) Planete refused to allow BID to inspect and collect goods delivered which Planete alleged to be defective; (d) Planete conduct in procuring distributorship arrangements directly with the principals of Peg Perego and Dorel brands with whom BID had exclusive distribution rights for Malaysia; (e) Planete conduct at end of 2006 asking Goh to transfer his shares in Planete and denying owing any money advanced to it by Goh; and (f) the obtaining of

an injunction against Goh on 12 April 2007.

[23] In our view, the grounds relied on by BID to say that Planete had repudiated the 2004 agreement are insufficient to prove a case of repudiation of the agreement. The refusal to pay the money owing for the alleged goods sold and delivered is not proven by any letter of demand for the same. Even if it is true it is only a breach of the term of the agreement as to payment. With regard to the conduct of Planete on attempting to obtain exclusive distribution rights in Malaysia from the principals or OEM these are not totally prohibited under the agreement. Also it must be noted that the attempts were made by the company, Planete; or in a worst case scenario by Ivan and Mirjana for the company Planete; and Goh, who was the alter ego of BID, was then also the director and shareholder of Planete. The issue regarding the transfer of Goh's shares in Planete and the obtaining of the injunction by Planete against Goh and BID arose from the internal problems within the company because of the allegation that Goh was influencing the employees of Planete to divert Planete's business interest, and in engaging in parallel importation. In our opinion, under the circumstances these grounds do not constitute a fundamental breach of the agreement that goes to the root of the contract making the contract impossible of performance or tantamount to refusal by Planete to perform the contract or as indication that Planete no longer intends to be bound by the terms of the agreement to constitute repudiation of the contract — see *Rasiah Munusamy v Lim Tan & Sons BHd* [1985] 2 MLJ 291. Therefore we agree with the learned High Court judge that there is no repudiation of the contract or the agreement by Planete; and the agreement subsisted until its expiry date on 31 December 2009 as envisaged by the parties.

[24] As for the 2005 agreement, we see nothing much in it except that it is a consensus reached by the signatories to the agreement to restrain from doing any act, commercial or otherwise, that would adversely affect the business of Planete. It was a commitment and understanding among the directors of Planete to protect the business of Planete against competition from their own.

[25] Now we return to the issue of parallel importation. *Halsbury's laws of Malaysia* Vol 2 defined 'parallel import' to mean strictly importation and sale of others of goods originating from the owner of industrial property rights in parallel with his own importation of such goods, whether carried out by himself or through authorised agents, but is used more generally to describe the importation and sale by third persons of goods obtained in another country which originates from an internationally known group or company. See also *Winthrop Products Inc & Anor v Sun Ocean (M) Sdn Bhd & Anor* [1988] 2 MLJ 317 and *Tien Ying Hong Enterprise Sdn Bhd v Beenion Sdn Bhd* [2010] 8 MLJ

550 at p 555. Thus the simplified view of parallel importation is importation of goods into a territorial market in competition with the existing distributor of the goods in that market. In other words it is of absolute importance to understand that a parallel importer is not an authorised distributor. These importers obtain the supply of genuine products from overseas sources which have not been authorised by the manufacturer to supply them to the parallel importer. The importer then markets the goods in its own territory in competition with the authorised distributors — see *Honda Motor Co Ltd and another v Neesam and others* [2008] EWHC 338. In the context of this case, Planete alleged that Goh through his company BID, was importing similar goods which Planete has distribution rights in Malaysia, under the agreement.

[26] On the evidence, the learned judge found that Goh and BID were guilty of parallel trading or importation on the following grounds:

> 71. According to PE, the specific instances of parallel importation were as supported by the production of a Macleren stroller (exhibit P4) purchased on 15 July 2007, a Mixi-cosy car cabrio seat (exhibit P5) purchased on 9 April 2009, a Bebe Sounds prenatal heart listener (exhibit P6) and a Bebe Sounds ear thermometer (exhibit P7) both purchased on 15 June 2007 being baby products procured through trap purchases by PE in Malaysia. In addition, PE relied on the baby products seized from Brand Melody Sdn Bhd during the Anton Pillar raid in mid 2007 as listed in exhibit P82.
>
> 72. These specific instances of parallel importation were not seriously challenged by GSH. However GSH in defence firstly denied that BID parallel imported the baby products into Malaysia as pleaded, to wit: the actions of BID were not parallel importation in the strict natural and ordinary meaning as set out in *Halsbury's Laws of Malaysia*. Parallel importation in this strict sense occurred only when goods made in one country were imported into another country without the consent of the owner of the industrial property rights in the country of manufacture or his licensee in the country of importation. In this regard, PE failed to prove that the importation and sale of the baby products were by GSH personally and without the consent of the owner of industrial property rights in Malaysia or his licensee. Besides, GSH contended that PE did not have the exclusive right to sell the baby products to the exclusion of BID in Malaysia and PE relied on the case of *Kenwood Electronics (M) Sdn Bhd and Anor v Profile Spec (M) Sdn Bhd and Others (Part 2)* [2007] MLJU 94; [2007] 2 CLJ 732 for support on this point.
>
> ...
>
> 75. I note that PE had in paragraphs 11 to 13 of its statement of claim in Suit 1 as well as paragraphs 23 to 27 of its counterclaim in Suit 2 alluded to the alleged parallel importation activities of GSH. At the outset and as held by the court of appeal in Alcatel-Lucent Malaysia Sdn Bhd (formerly known as *Alcatel-Lucent (M) Sdn Bhd (formerly known as Alcatel Network Systems (M) Sdn Bhd) v Solid Investments Ltd and another appeal* [2012] 4 MLJ 72, I find that any wrong attributable to parallel importation by BID ought to be pursued against BID directly instead of

GSH in Suits 1 and 2 because it was BID that was prohibited by the Agreement. PE did not plead and prayed for the lifting of the corporate veil. Nevertheless since GSH was the alter ego of BID at all material times, the evidence of wrongful parallel importation by BID as well as by other companies controlled by GSH is in my view relevant. This evidence may be used in both these suits to find GSH personally liable for breach of trust or fiduciary duties as director of PE and other economic torts as pleaded where so justified and proven.

[27] The learned judge found that Goh and BID did not seriously challenge the allegation by Planete that they had been involved in parallel importation to the detriment of Planete. The learned judge rejected Goh and BID contention that parallel importation as defined by *Halsbury's Law of Malaysia* ought to be construed strictly. The learned judge said at para 76 of his judgment:

76. I next turn to whether parallel importation as contended by GSH ought to be construed in the strict legal fashion as defined in *Halsbury's Laws of Malaysia*. From my reading of that definition itself, there appears to be a strict as well as a general meaning. In my opinion, the meaning as explained by Ivan and relied upon by PE is encompassed within and consistent with the general meaning. GSH could have asked for further and better particulars of the pleadings to pin PE down but that was not pursued pre trial. PE was thus not bound by the strict legal meaning of parallel importation. In any case, the thrust of PE's complaint seems to me to be BID's act of supplying goods to third parties in Malaysia in breach of the Agreement and the resultant unfair business competition with PE.

[28] It is pertinent to note that at least the parties are agreeable that parallel trading is not forbidden under Malaysian law. However as between the parties herein it was forbidden under the agreement. This was found to be so by the learned judge.

[29] Our view is that by definition of the term or concept of parallel importation, Goh or BID cannot be said to have committed parallel trading or importation if they imported goods of which neither they nor the Planete has exclusive distribution rights in Malaysia. In this regard it is noted that the learned judge had found as a matter of fact that BID had the exclusive distribution rights for Maclaren products in Malaysia till today. His Lordship also found as a fact that at the point of time of execution of the 2004 agreement, there was no exclusive distributorship in Malaysia for products by Peg Perego, Dorel or BFree. The evidence shows that before 18 July 2004 (the date which Planete alleged that it obtained a letter from Maclaren (HK) Ltd on exclusive distributorship rights of Maclaren products in Malaysia), Planete did not have any exclusive distribution rights for any baby products from any of the suppliers or principals except from BID. Moreover the learned High Court judge relied on evidence of 'trap-purchases' from Brand Melody and eight other companies to show that Goh or BID had engaged in parallel importation. We have two observations on this evidence. First, there is no

evidence to show that Brand and the eight other companies were control by Goh or BID. These are separate and distinct companies. Second, BID itself has no branch or outlet in Malaysia. It is Singapore incorporated company. Thus, we agree with the submission by learned counsel for Goh and BID that there is no evidence presented to court by Planete to prove parallel importation by Goh or BID. However with regards to Goh and BID obligations under the agreement things are quite different. Under the agreement they were forbidden to import goods in competition with Planete. Thus if either Goh or BID, particularly Goh committed such act, they would be in breach of the agreement. As for Goh, as a director of Planete, he also would be in breach of his fiduciary duty to Planete. Section 132(1) of the Companies Act 1965 provides that a director of a company shall at all times exercise his powers for a proper purpose and in good faith in the best interest of the company. To be in business competition with a company of which you are a director is not exactly acting in good faith and for the best interest of the company! With regard to 2005 directors' agreement which learned counsel for Planete submitted that Goh had admitted to various acts such as bribery and diversion of the interests of Planete employees and parallel importations to the detriment of Planete; and Goh's commitment to stop this activities, our view is that this is not conclusive evidence to say Goh was involved in parallel importation activities. In our view the 2005 directors' agreement is nothing more an agreement amongst the Directors of Planete not to engage in a business in competition with the company of which they were directors. We do not think that one can read into the agreement an admission by Goh that he was guilty of those acts which were alleged against him by Ivan and Mirjana. It is evident from the cross-xamination of Ivan that even before Planete entered into the 2004 exclusive distributorship agreement with BID, the latter already had exclusive distributorship rights for Peg Perego and Dorel products in Singapore and Malaysia, though no formal distributorship agreement was executed. It appears on the evidence that Ivan and Mirjana were putting the blame on BID, through it alter ego Goh, competitive activities for the poor business performance of Planete. Learned counsel for Goh also pointed out in her written submission that Goh too then had helped a friend under business name Bambino, a distributor in Malaysia to buy and bring in Avent products from a distributor in Singapore to Malaysia even though neither BID nor Planete had any distribution rights for the products in Malaysia or Singapore. It was the contention of BID and Goh that Planete, through its director Ivan and Mirjana had approached the principal for Maclaren and Peg Perego on or about 2005 for letters recognising Planete as the exclusive distributor for the products to bolster their chances of getting credit facilities from the banks. It was also contended that Goh assisted Planete to procure these letters from the principal respective on the understanding that once Planete had obtained the credit facilities, BID would be paid the money owing to it by Planete for all the goods that had been supplied by BID to Planete previously and which remained unpaid. These letters would serve to show the banks that Planete had viable and

vibrant business. True enough, in early and mid-2006 Planete obtained credit facilities from Bank Bumiputra and Maybank. The facilities were guaranteed by personal guarantee of Planete's directors including Goh.

[30] It may be noted that it was Ivan and Mirjana that approached Goh and invited him to join with Planete as shareholder and director so that Planete could form a synergy with BID to enable Planete to be BID exclusive distributor of its products and the brands it represent in Malaysia. Ivan and Mirjana were then the consultants of Peg Perego brands for Asia through their company Glorious Field knew at that material time that Goh was the director and major shareholder of BID which had distribution rights for various brands of baby products in Malaysia including products by Peg Perego. Under these circumstances we are of the view that Goh's version of events regarding the alleged parallel importation, the procurement of letters of recognisance as exclusive distributor for the purpose of obtaining credit financing or credit lines and poor business performance by Planete is more probable. *Therefore on the facts we think that Goh would be in breach of his fiduciary duty as director of Planete and in breach of 2004 agreement.*

[31] The second issue for determination is whether Goh had advanced monies for Planete's use in the course of their business. To support this claim, learned counsel for Goh submitted that documentary proof to show that several sums of monies were deposited into Planete's account with Maybank on 20 May 2003 (Public Bank cheque for RM110,150), 19 July 2003 (Public Bank cheque for RM102,330), 23 August 2003 (Public Bank cheque for RM86,800) and on 2 October 2003 (intrabank transfer of RM50,457.22). The payment or deposit made on 19 July 2003 and 23 August 2003 was from a third party Perniagaan Import & Export Yan Sun and payment or deposit on 2 October 2003 also from a third party Radex Enterprise.

[32] Planete resisted this claim by Goh on two main grounds. Firstly, the advances were by third party namely Perniagaan Import & Export Yan Sun and Radex Enterprise. Secondly, the claim was time barred. Before we discuss the two grounds, it will be noted that Planete never denied that around the material times moneys were deposited in their account.

[33] On the first ground, learned counsel for Planete submitted that there is no documentary evidence be it by way of correspondences or otherwise to show that Planete had agreed to a personal loan of RM349,297.22 (SGD112,796 and USD27,000) by Goh to Planete. There is also no evidence of any minutes of Planete's board meeting that recorded the agreement or the discussion on the matter. The absence of any agreement on the matter was confirmed by Mirjana

('PW2') and Goh in their respective cross examination of their testimony. Goh however had produced a letter dated 3 May 2007 from Perniagaan Import & Export Yan Sun and had called Kua Ah Lia ('DW2') to testify that the letter is the proof that Goh had banked in the money into Planete's Maybank account through Perniagaan Import & Export Yan Sun. It appears to us that this is the principal evidence relied on by the learned judge to hold that Goh had made personal advances or loans to the company Planete. Learned counsel for Planete had challenged the truth of this letter as well as the evidence of DW2. It was argued that this letter was addressed not to Planete but to Goh. The original of the letter was also not produced to the court. On cross-examination of DW2 by learned counsel for Planete it was proven that DW2 was not the maker of the letter and had no personal knowledge of the letter. DW2 further testified the letter was executed by his brother Kua Yong Huat, as DW2 was overseas at the material time; and Kua Yong Huat was not called to testify. The evidence also shows that there were two of such letters — one letter (at p 5586 of the appeal record) bears the signature of DW2's clerk and another copy of the same letter (at p 3852 of the appeal record) has the signature of his younger brother Kua Yong Huat. Therefore it was submitted that the letter ought not to be admitted in evidence because it is hearsay. We agree with this submission. The maker of the letter was never called to testify; and no explanation was given why he could not be called and also no explanation as to why the original letter was never produced in court. Learned counsel for Planete further submitted that the learned High Court judge never took all these factors into consideration. However there were circumstantial evidence that may support Goh's version as to the personal loan. Firstly, Planete's audited account of 2005 shows a sum of RM609,290 were owing to the directors and the auditors' notes on this amount is that it represents unsecured interest free advances with no fixed terms of repayment. However there were no details given in the audited account as to who were the directors that Planete was owing money to. Secondly, there is no evidence that Planete had business tradings with Perniagaan Import & Export Yan Sun or Radex Enterprise. Therefore the argument is why would they deposited the money into Planete's Maybank account except to oblige the request from Goh.

[34] With regard to the alleged personal loan of USD27,000 by Goh and paid into Planete's Maybank account through Radex Enterprise, our observations above as to lack of agreement and documentary evidence applies. Further, no witness was called to testify to the giving of this loan. The only evidence is the bank pay-in slip. We also mindful of the submission that there is no evidence to prove that the moneys were given to Perniagaan Import & Export Yan Sun and Radex Enterprise by Goh to be deposited into Planete's Maybank account. Goh in his claim for the repayment of this so-called personal loans or advances never pleaded the fact that Perniagaan Yan Sun and

Radex Enterprise were his agent for the purpose. It is also noted that Goh was not only a director of Planete but also its shareholder. Could the money paid into Planete's Maybank account allegedly for Planete's working capital was in fact payment for his shareholding? Goh was director and shareholder of Planete from its inception which was around 2003–2004. The deposits were made in 2003. Thus on the totality of the evidence in respect of the personal loan purportedly given by Goh to Planete, we are of the view that on the balance of probabilities it is not satisfactorily proven by Goh. One possible explanation for the deposit to be into Planete's account by Perniagaan Import & Export Yan Sun and Radex Enterprise is that it could be for something else other than as a loan.

[35] On the second ground that is limitation, learned counsel for Goh submitted that a demand was made for the repayment of the loan on 14 March 2007. But Planete said it never received the demand letter. The writ was filed on July 2009. And the audited account of Planete showed that there are moneys owing to the directors by the company. It was further submitted Goh had signed a letter of subordination sometimes in 2005 to enable Planete to apply credit line from banks. This letter of subordination, it was said, clearly shows that Planete owes Goh a sum of RM400,000. Therefore it was contended for Goh that the claim is not time-barred. However the learned counsel for Planete informed the court that he is not taking up the issue. Therefore we would not say anything more on this.

[36] On the third issue, the learned judge ordered Planete to pay BID the sum of SGD939,085.44 (equivalent of RM2,141,490 at exchange rate on 9 February 2007) for goods sold and delivered by BID to Planete pursuant to the 2004 agreement. BID alleged that Planete failed to make full payment of the price for seven lorries of goods delivered to it from BID through an intermediary. The intermediary was Perniagaan Import & Export Yan Sun. The goods were imported, on BID's behalf, from Singapore. Yan Sun was controlled by two brothers — Kua Ah Li and Kua Yong Huat. The former appeared in court to testify on behalf of BID and Goh as DW2. It is BID evidence that these seven lorries of goods were delivered between the period from 17 September 2003–31 March 2003 — that is the period before the 2004 agreement. It was submitted that Planete only paid partially for the goods in the sum of RM400,000.

[37] Evidence of cheques payment, invoices, Cargo Clearance Permit issued by Singapore Customs, Malaysian Customs' Clearance Form signed by Yun Sun, consignment notes and acceptance by Planete were produced in court to prove this claim. These evidences are supported by the oral testimony of DW2 who admitted that he or Yun Sun had no direct business relationship with Planete except to assist BID in the importation of the goods from Singapore to

be supplied to Planete. Evidence of payment to the transporter Giada was also produced and shown to the trial judge. These evidences were specific to the point that they identified the lorries which carried and transported the goods. It was further submitted that the monthly turnover of Planete suggests that the goods were delivered and received and sold by Planete. In terms of logic this argument makes sense. It is quite impossible to imagine Planete doing tradings without the goods being delivered and received. Planete had not shown that it had ordered or received goods for its business from other sources.

[38] It was also contended that after the signing of 2004 agreement BID sold and supplied goods directly to Planete from warehouse in Singapore as well as procured the supply of goods to Planete directly from the principals overseas using BID's credit facilities. It was alleged that for this category of goods supplied and delivered, Planete has failed to pay the price of a total 21 lorries load delivered by transporter Giada Trading & Transport Co Pte Ltd totaling SGD767,104.47 and for the goods delivered personally by Goh by car totaling SGD5,709.44.

[39] Planete resisted this claim and said that BID had failed to produce any purchase orders for the said goods alleged supplied and delivered to it. Planete relied on the general evidential principle that he who asserts must prove. However the learned judge had sufficiently addressed this issue in his judgment. The learned judge acknowledged that in normal circumstances of a claim for goods sold and delivered, the claimant is required to show to court three key documents: the purchase order, the delivery order and the invoices unless satisfactorily explained otherwise. This is usual in an ordinary supplier and purchaser relationship. The learned judge went on to say that in such commercial transactions, these documents are normally expected to be generated in the course of business and hence produced as the best evidence in court. However, the learned judge held that '... that sort of documentation generated need not be identical in a supplier and wholesaler/distributor relationship particularly where there is a master distribution agreement and commonality in shareholding/directorship of the supplier and distributor companies as in the case herein. In other words, more informality and flexibility are to be expected including without formal purchase order issued in writing'.

[40] However, learned counsel for Planete submitted that from oral testimony of Goh it was obvious that there was a purchase order system in place between Planete and BID and this was a documented process between the parties. It would therefore be reasonable and legitimately expected that in claim for non-payment of goods sold and delivered to Planete, BID would have the relevant purchase orders to show. However it also Goh's evidence that the

purchase order were sent by email, using excel sheet; and sometime just by phone call. Goh's evidence was corroborated by PW6.

[41] Besides the issue of non-production of the purchase orders, Planete also raised other grounds to refute BID's claim for alleged unpaid goods sold and delivered. These grounds are noted by the learned judge at para 126 of His Lordship's judgment. His Lordship then went on to deal with these grounds or defences raised by Planete seriatim at paras 133–137 of the defence. Having examined and analysed the evidences as to the claim by BID for payment of moneys for goods sold and delivered, the learned judge concluded in paras 129–131 of his judgment as follows:

> 129. I am satisfied and find that prior to the execution of the Agreement on 1 July 2004, the supply of the goods by BID to PE was carried through an intermediary, Perniagaan Import & Eksport Yan Sun which was familiar with the process of importation of BID's good from Singapore into Malaysia. From the totality of the evidence adduced, to wit, both documentary evidence and oral testimony of GSH, PW6, DW2, DW3, DW5, DW6 and DW7; there were a total of seven loads delivered using this intermediary and Giada Trading & Transport Co Ltd as the haulier. The supporting documentary evidence adduced were BID tax invoice, BID invoice, Perniagaan Import & Eksport Yan Sun invoice and packing list, Malaysian Customs declaration forms, Singapore Customs cargo clearance permit and consignment note of Giada Trading & Tranport Co Ltd all as detailed in exhibit D103. I find and hold that these documents were not engineered by BID for this trial contrary to the allegations of PE. They were in my view self explanatory and cogent after hearing the testimony of BID's witnesses. Hence, they are sufficient for to me to find that the goods were sold and delivered to PE on the balance of probabilities. These goods were delivered over the period from 17 September 2003 to 31 March 2004 totaling to SGD166,273.53. PE partially paid RM400,000 for them by way of various cheques to BID from PE's Maybank account and to Perniagaan Import & Eksport Yan Sun on 21 July 2005, 5 August 2005 and 2 September 2005. The unpaid balance thus amounted to SGD166,267.53 (approximately RM362,463.21).
>
> 130. Thereafter, I am also satisfied and find that BID directly supplied a further 17 loads of goods to PE using Giada Trading & Tranport Co Ltd as the haulier and 4 loads via BID's purchase from the foreign principals and sent by these principals directly to PE totaling SGD767,108.47 as well as a further SGD5,709.44 for several deliveries made by GSH himself by car. These deliveries were in the period between April 2004 and mid 2006 as typically evidenced by the BID invoice, BID tax invoice, Baby Hyperstore invoice, BID packing list, Malaysian Custom's declaration forms and consignment note of Giada Trading & Transport Co Ltd for those transported via Giada Trading & Tranport Co Ltd. For those goods sent directly by the foreign principals, they were evidence by BID invoices, Baby Hyperstore Ltd invoice, packing list letter of credit and letter of advice of settlement bill import for letter of credit. As for those sent by car, they were backed by order for delivery and BID invoices. They were all detailed in exhibit D104. Again, I find and hold that these documents were not engineered by BID for the trial. These documents were cogent and were sufficient proof of the deliveries on the balance

probabilities. Accordingly PE owed BID in the sum of SGD772,817.91. This sum was unpaid albeit PE has paid BID against other invoices for goods supplied by BID in the sum of nearly RM1.4 million over this period as admitted by BID.

131. As to the defences raised by PE, I observed at the outset that they were sweeping and general. The 'shotgun' rather than the 'sniper' approach was adopted by PE. By the 'shortgun' approach, the party shoots in the dark hoping to strike a target whereas by the 'sniper' approach, the party aimed at a definite target. The adoption of this 'shotgun' approach by PE prima facie demonstrated to me its lack of certainty and confidence in defending the claim.

[42] As for documents such as invoices, letter of credit, packing list and letter of advice of settlement bill, etc produced by BID for goods delivered between April 2004 and mid 2006, the learned judge had examined them and concluded that: 'They were all detailed in exhibit D104. Again I find and hold that these documents were not engineered by BID for the trial. These documents were cogent and were sufficient proof of the deliveries on the balance of probabilities'. We are of the opinion that the learned judge had given his utmost consideration to the evidence before him and on those evidence His Lordship had arrived at certain finding of facts as to the goods sold and delivered during the period claimed by BID which payment has not been made. We find no good reason to interfere with those findings. Accordingly, we are of the view that Planete appeal on this issue ought to be dismissed.

[43] The fourth issue in these appeals is whether the 170,000 shares in Planete held by Noor Zulaini bt Yunos were held on trust for Goh. The learned judge found and held that it is so. The learned judge had discussed this issue in his written judgment under the heading of 'Corporate Manoeuvres'. From the evidence it appears that the shares were originally held by Noor Zulaini on trust for Goh evidenced by a trust deed dated 13 December 2004 entered between Goh and Noor Zulaini and stamped on 22 December 2004. A photocopy of the trust deed was admitted in evidence as exh D107. The shares were subsequently transferred to Norzaini bt Mohd Zain and Roslina bt Rashid allegedly without Goh's knowledge. The background to the disputes as to the shares which resulted in Goh seeking declaration from the court that the transfer of the shares and all the resolutions passed in relation to the shares and their transfer after 12 April 2007 and all other incidentals thereto were invalid and void; and the shares were held in trust for Goh was narrated admirably by the learned judge in his written judgment and they are produce below:

107. Besides the substantive disputes that were dealt hereinabove, there were alleged corporate manoeuvres made by PE from 2007 onwards to wither GSH's standing and influence in PE. It seen from the pleadings that both PE and GSH also claimed for various reliefs in relation to corporate shareholding, directorship, administration, etc. of PE consequential to their disputes.

108. By reason of the alleged breach of trust and fiduciary duties on the part of GSH, PE sought for orders from the Court to transfer GSH shares to Roslina Binti Rashid and GSH removed as director to PE. Accordingly PE prayed for the register of the members of PE to be updated to reflect the same by the Companies Commission of Malaysia and PE's company secretary.

109. GSH counterclaimed for declarations that the raising and allotment of shares in PE to Norzaini Binti Mohd Zain and Roslina Binti Rashid, transfer or sale of shares held by Noor Zulaini on trust for GSH, resolutions passed in any meetings after 12 April 2007 with regards to the transfer or sale of shares by Noor Zulaini and all actions taken thereunder including the registration were invalid and void. Consequently GSH also prayed for the register of the members to be rectified to reflect the cancellation of the shares, inquiry into the accounts of PE as well as payment of GSH's director fees from 2007.

110. It is plain that from the beginning of 2007 the disputes and differences between Ivan/Mirjana on behalf of PE and GSH were irreconcilable and were heading towards bitter civil litigation. On 12 April 2007, PE obtained in Suit 1 an interlocutory injunction against GSH which disallowed GSH from being involved in PE's business and prohibited GSH from holding out himself as a director and shareholder of PE and from interfering with the business of PE.

111. That notwithstanding, GSH contended that the injunction did not release or exempt PE from administering its affairs in disregard of the Companies Act, 1965 such as properly serving notices on GSH and obtaining his consent in relation to the transfer of shares, increase in share capital, etc. In other words, PE was not exonerated from discharging its duties towards GSH as shareholder and director. Hence GSH in essence accused PE for having made corporate manoeuvres to outs GSH from PE to his detriment.

112. The alleged corporate manoeuvres involved the change of the correspondence address of the GSH from 11-06 Block B Maxwell Tower, 10 Jalan 5/58C 46000 Petaling Jaya to 1 Jalan SS22A/4 Damansara Jaya 47400 Petaling Jaya in mid 2010 and then a change back to 11-06 Block B Maxwell Tower, 10 Jalan 5/58C 46000 Petaling Jaya in 2012 as confirmed by the company secretary of PE Chong Houng Hong, DW4.

113. Consequent to the change in address, corporate notices were not received by GSH. He was therefore at the material time kept in the dark over the change in the shareholding structure of PE. The change obviously resulted in the dilution of his shareholding in PE. This was caused by the transfer of the shares held by Noor Zulaini on trust for GSH to Norzaini Binti Mohd Zain and Roslina Binti Rashid as well as the enlargement of share capital involving them.

114. The alleged corporate manoeuvres were of course denied by PE. In addition PE contended that the corporate restructuring was validity done without the participation of GSH by reason of the injunction order obtained against him in 2007.

[44] The learned judge had granted the declaration sought by Goh by acting pursuant to ss 41 and 42 of the Specific Relief Act 1950 which the learned judge held, and we agree, give the court discretion to make the declaratory

order. The learned judge also relied on O 15 r 16 of the Rules of Court 2012. Citing the case of *Dato' Raja Ideris bin Raja Ahmad & Ors v Teng Chang Khim (Chairman of the select Committee on Competence, Accountability and Transparency and the Chairman of the Committee of Rights and Privileges State Legislative Assembly of Selangor) & Ors* [2012] 5 MLJ 490 which laid down the principle that the court's jurisdiction to make declaratory judgments is limited subject only to its own discretion.

[45] In our opinion the exercise of the discretion by the court in this case ought not to be disturbed. The learned judge had made a finding of fact on the evidence that the dealing with or transfer of the shares was without the knowledge of Goh. The learned judge had also exercised his discretion to admit the photocopy of the trust deed pursuant to s 73A of the Evidence Act 1950 though the original was not produced in court. The reason for this was that Noor Zulaini was nowhere to be found to give evidence on the trust deed. Planete had challenged the authenticity and veracity of the trust deed. However the learned judge opined that the photocopies could be admitted because Planete 'did not overcome its evidential burden of calling Noor Zulaini to rebut the existence of the trust'.

[46] Lastly we will say something as to the complaint by Planete that the learned judge had erred in failing to award Planete with exemplary damages against Goh for his involvement in parallel import and alleged interference with Planete business. First of all, the learned judge was correct on the law that the award of exemplary damages is discretionary *KFH Ijarah House (M) Sdn Bhd v Aamir Nordin bin Ariffin* [2010] MLJU 450; [2010] 1 LNS 394. The exercise of the discretion is governed by the conduct of the party against whom the damage is sought which shows total disregard of the rights of the others, particularly the claimant. In this case the learned judge found that Goh's conduct 'was not so wanton and contumelious in absolute disregard of the rights of Planete'. The learned judge noted that it was wrong for Goh to be involved in parallel importation. However the learned judge also found that Goh had done so under a mistaken belief that BID, of which he was the major shareholder and director, had exclusive distribution rights to baby product brands other than Maclaren in Malaysia as well as that the 2004 agreement had been terminated because of repudiation by Planete. The learned judge held that Goh's action was defensive rather than offensive.

[47] For all the reasons above, we allow Appeal No B-02(IM)-27–01 of 2015 and dismiss the rest of the appeals and vary the decision of the High Court to that extent. By consent of parties, each party bears its own cost. Deposit to be refunded to respective the appellant.

Planete's appeal against the order to repay Goh the sum of RM356,504.88 allowed and other appeals dismissed with each party to bear its own cost.

Reported by Kohila Nesan